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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TORRANCE UNIFIED SCHOOL DISTRICT,

Plaintiff/Counterdefendant,

vs.

E.M., a minor, MARYL M.,

Defendant/Counterclaimants.

Case No. CV 07-2164 CAS (Rzx)
c/w: CV 07-2218 CAS (JTLx)

ORDER AFFIRMING
ADMINISTRATIVE LAW JUDGE'S
DECISION

I. INTRODUCTION

This administrative appeal arises under the Individuals with Disabilities Act (the "IDEA"), 20 U.S.C. §§ 1400 et seq. On April 2, 2007, plaintiff and counterdefendant Torrance Unified School District ("the District") filed the instant suit against defendant and counterclaimant E.M., a minor, Maryl Magee, E.M.'s mother and guardian ad litem, (sometimes referred to herein as, "Ms. Magee") (collectively, "Student"), and the California Office of Administrative Hearings, Special Education Division (the

1 “OAH”).¹ The District seeks partial reversal of the Administrative Law Judge’s
 2 (“ALJ”) January 5, 2007 decision, which found, among other things, that E.M. is
 3 eligible for and entitled to special education placement. On May 29, 2007, Student filed
 4 a counterclaim seeking reversal of those issues of the administrative decision on which
 5 the District prevailed.²

6 Presently before the Court is the District’s administrative appeal, and E.M.’s
 7 motion for summary judgment on her counterclaims.³ A hearing was held on this matter
 8 on April 4, 2008. The parties present two issues for determination. First, the Court
 9 must decide whether the District violated its “child find” duty, defined *infra*. Second,
 10 the Court must decide whether E.M. qualified as a child with a disability by reason of a
 11 “serious emotional disturbance” (“ED”).

12 II. STATUTORY FRAMEWORK

13 The IDEA provides federal funds to state and local agencies to provide a special
 14 education to children with disabilities. 20 U.S.C. § 1412(a); Ojai Unified Sch. Dist. v.
 15 Jackson, 4 F.3d 1467, 1469 (9th Cir. 1993). To this end, schools are charged with what
 16 is known as a “child find” responsibility of locating, identifying, and assessing all
 17 children who reside within its boundaries who are suspected of being children with

18
 19 ¹ On July 18, 2007, the District voluntarily dismissed the OAH as a defendant.

20 ² On August 11, 2007, E.M., by and through Ms. Magee, and Ms. Magee, filed suit
 21 against the District, Mario Liberati, Mark Knox, Amy Schumaker, Aaron Benton, Heidi
 22 A. Ashcraft, Michael P. Ernst, Albert Muratsuchi, Terry L. Ragins, Mark Steffen, and Does
 23 1-100 filed suit in a related case. See E.M. et al. v. Torrance Unified Sch. Dist., et al., Case
 24 No. CV 07-2218 CAS (JTLx). The complaint alleges five claims for relief arising under
 25 the IDEA, the Rehabilitation Act, 29 U.S.C. §§ 794 *et seq.*, the Americans with Disabilities
 Act, 42 U.S.C. §§ 12132 *et seq.*, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. By
 order dated September 10, 2007, the Court consolidated these cases.

26 ³ As a matter of procedural convenience summary judgment may be utilized to
 27 resolve a case under the IDEA. L.S. v. Newark Unified Sch. Dist., 2006 U.S. Dist. LEXIS
 34766, at *14 n.1 (N.D. Cal. May 22, 2006). Substantively, the procedure is an appeal
 28 from an administration decision. Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d
 884, 892 (9th Cir. 1995).

1 disabilities and therefore in need of special education and related services. 20 U.S.C. §
2 1400(a)(3); 34 C.F.R. § 300.125; Cal. Educ. Code § 56302. California implements the
3 IDEA child find requirement by “requiring local school districts to identify disabled
4 students by ‘actively and systematically seeking out all individuals with exceptional
5 needs.’” Miller v. San Mateo-Foster City Unified Sch. Dist., 318 F. Supp. 2d 851, 854
6 (N.D. Cal. 2004) (quoting Cal. Educ. Code § 56300)). A parent, guardian, teacher,
7 service provider, or foster parent may refer a student for a special education assessment
8 by submitting a written request for the same. Cal. Educ. Code § 56029(a)-(c).

9 The purpose of the IDEA is, among other things, to provide all children with
10 disabilities

11 a free appropriate public education [(“FAPE”)] that emphasizes special
12 education and related services designed to meet their unique needs and
13 prepare them for employment and independent living; [] to ensure that the
14 rights of children with disabilities and parents of such children are
15 protected; [] and to assist States, localities, educational service agencies,
16 and Federal agencies to provide for the education of all children with
17 disabilities.

18 20 U.S.C. § 1400(d)(1)(A)-(C). This purpose is implemented through the development
19 of an individualized education plan (“IEP”), which is crafted by a team including a
20 student’s parents, teachers, and the local educational agency. 20 U.S.C. § 1414(d). The
21 document prepared by the team contains the student’s current level of performance,
22 annual goals, short and long term objectives, specific services to be provided and the
23 extent to which the student may participate in regular educational programs, and criteria
24 for measuring the student’s progress. Id.

25 The IDEA requires that educators also guarantee certain procedural safeguards to
26 children and their parents, including notification of any changes in identification,
27 education and placement of the student, as well as permitting parents to bring
28 complaints about matters relating to the student’s education and placement, which may

1 result in a mediation or a due process hearing conducted by a local or state educational
 2 agency hearing officer. 20 U.S.C. § 1415(b)-(i). The burden of proof in the
 3 administrative hearing lies with the party challenging an IEP, whether that be the child
 4 or the school district. Schaffer v. Weast, 546 U.S. 49, 61 (2005).

5 A party may bring a civil action in state or federal court in the event that it is
 6 dissatisfied with the decision of an agency hearing officer. 20 U.S.C. § 1415(i)(2).
 7 “The burden of proof in the district court rest[s] with . . . the party challenging the
 8 administrative decision.” Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099, 1104 (9th
 9 Cir. 2007). The court, in considering a request for review of a hearing officer’s
 10 decision, must base its decision on the preponderance of the evidence, and grant such
 11 relief as the court determines is appropriate. Id.

12 **A. DEFINITION OF “SERIOUS EMOTIONAL DISTURBANCE”**

13 As pertinent to this case, a child with a disability includes a child with a “serious
 14 emotional disturbance,” “who, by reason thereof, needs special education and related
 15 services.” 20 U.S.C. § 1401(3)(A)(i)-(ii). ED is defined as

16 a condition exhibiting one or more of the following characteristics over a
 17 long period of time and to a marked degree that adversely affects a child’s
 18 educational performance:

- 19 (A) An inability to learn that cannot be explained by intellectual,
 20 sensory or health factors.
- 21 (B) An inability to build or maintain satisfactory interpersonal
 22 relationships with peers and teachers.
- 23 (C) Inappropriate types of behavior or feelings under normal
 24 circumstances.
- 25 (D) A general pervasive mood of unhappiness or depression.
- 26 (E) A tendency to develop physical symptoms or fears associated
 27 with personal or school problems.

28 34 C.F.R. § 300.8(c)(4)(i); Cal. Code Regs., tit. 5, § 3030, subd. (i).

1 Each state interprets for itself the meaning of the language of the federal
2 regulation. R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 (9th Cir. 2007).
3 “Rather than promulgate additional regulations, California relies on case-by-case
4 administrative adjudication of IDEA eligibility.” Id.

5 **III. FACTUAL BACKGROUND**

6 **A. E.M.’S FAMILY LIFE**

7 E.M. was born on June 4, 1994. At the time of the administrative hearing in this
8 matter, E.M. was twelve years old.

9 The record shows that there has been some turmoil in E.M.’s family life.
10 Ultimately, E.M.’s parents separated during early 2005, and later that year her mother
11 filed for divorce. In February 2005, the California Department of Children and Family
12 Services removed E.M. from her home due to issues related to her father. E.M. was
13 placed with her maternal cousin’s family, but had to be removed after a month because
14 she became involved in an altercation with the cousin’s children. She was then placed
15 in a foster home in South Torrance. During this time, E.M. continued to attend school
16 in the District, which required her to drive two hours each way to get to school. In
17 April 2005, E.M.’s maternal aunt moved in with Ms. Magee, and E.M. was placed with
18 her aunt. In September 2005, E.M.’s maternal aunt was permitted to move out of the
19 home.

20 **B. E.M.’S ACADEMIC PERFORMANCE**

21 E.M. has attended public schools in the District since kindergarten. Until 2005,
22 E.M. has generally performed well academically. In April 2003, when E.M. was eight
23 years old and in the third grade, she was referred to the Gifted and Talented Education
24 (“GATE”) Program. E.M. was placed in the GATE program during the first trimester
25 of the 2003-2004 school year, when she was in the fourth grade. The record shows that
26 until the 2005-2006 school year, E.M. received As and Bs in all academic subjects, and
27 scored above average on her standardized tests.
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C. E.M.'S BEHAVIORAL PROBLEMS

E.M. attended Edison Elementary School ("Edison") during the 1999-2000 school year, when she was in kindergarten. The record indicates that prior to the 2003-2004 school year, there were a few documented incidents of behavioral problems at Edison. On January 24, 2000, E.M. received a one day suspension for biting another student. The suspension notice documenting this incident indicates that E.M. had previously been warned about biting others. On February 2, 2000, E.M. spit on another child, stating that she did so because "she wanted to." Administrative Record ("A.R.") at 1730. E.M. was suspended for one day. E.M.'s progress report for the third trimester of the 1999-2000 school year indicates that E.M. "[m]ade great progress with her behavior." *Id.* at 1940, 2091; 2108 ("Erin has made progress in learning to take responsibility and accept consequences for her behavior."). During second grade, the 2001-2002 school year, "E.M. continued to lack self-control," and her teacher sent E.M.'s parents daily behavioral reports. *Id.* at 1938. E.M.'s progress report for the third trimester of second grade states that although "[E.M.] has shown excellent progress academically[,] . . . she still needs reminder [sic] about appropriate classroom behavior." *Id.* Her third grade progress report, the 2002-2003 school year, indicates that E.M. had difficulty controlling her anger.

After the first trimester of the 2003-2004 school, E.M. moved. She then enrolled in Walteria Elementary School ("Walteria"), which is also located in the District. Because there was no space for E.M. in the GATE Program at Walteria, E.M. was placed with other higher-achieving students in a combined fourth and fifth grade class. While at Walteria, E.M. repeatedly misbehaved. The first documented incident involving E.M. occurred on January 20, 2004. After a teacher told E.M. that she would have to attend study hall to complete a math assignment, E.M. threw a tantrum. She pounded her head on the desk, hit her head with a water bottle, and finally threw the water bottle across the table, which hit another student on the arm. The District suspended E.M. for one-and-a-half days. The suspension notice documenting the incident indicates that E.M.

1 had previously thrown a chair in a teacher's classroom. On April 7, 2004, E.M. received
2 lunchtime detention for grabbing another student's arm and squeezing it while growling
3 and making animal noises. On April 27, 2004, E.M. got upset during a game of chess,
4 and pulled a student's hair and punched another student in the stomach. The school
5 suspended her for two and one-half days. Just after returning from this suspension, E.M.
6 was involved in another incident, which resulted in the imposition of an office
7 suspension. Specifically, after a student told E.M. that her feet were "stinky," E.M.
8 gestured as if she going to hit the student on the head with a notebook. Id. at 1734.
9 Another student attempted to dissuade E.M. from hitting the child, and E.M. hit the
10 intervening student in the nose with her fist. On May 17, 2004, E.M. pinched another
11 student and also pulled the student's hair. E.M. said that she did so "due to a temper
12 outburst." Id. at 1744. On that same day, she punched a student in the stomach because
13 the student was "bossing" her. Id. On June 9, 2004, during lunch recess, E.M. jumped
14 on another student, and did not get off until he had twice demanded that she do so.
15 During this time, E.M.'s weekly progress reports indicated that her classroom behavior
16 was generally good or satisfactory, but that her playground behavior was unsatisfactory.

17 On September 24, 2004, during the 2004-2005 school year, E.M. pulled another
18 student's hair because the student was teasing E.M.'s friend. On October 5, 2004, E.M.
19 kicked a student twice during physical education class. She said she did so "for [her]
20 amusement." Id. at 1739. A discipline referral form dated October 19, 2004, which was
21 completed by E.M.'s fifth grade teacher, states that E.M. threw a water bottle at another
22 student because she thought the student was making fun of her, and that E.M. kicked a
23 student in line for not walking quickly enough. On November 5, 2004, E.M. was
24 suspended after she punched another student in the stomach. On April 1, 2005, E.M. was
25 suspended for two days after a student complained that E.M. was bullying him, tripping
26 him, teasing him, and ramming her backpack into his legs. E.M. stated that she had been
27 doing so for approximately one month. On April 18, 2005, E.M. received another

1 suspension after she attempted to punch another student several times in the stomach, and
2 actually punched the student in the face, causing the student's lip to swell. E.M. also
3 threw her backpack at, and hit, another child. On June 8, 2005, E.M. swung her jacket,
4 and deliberately injured two students; one in the eye, and the other on the back of the
5 neck.

6 In the fall of 2005, when she was in the sixth grade, E.M. began attending
7 Richardson Middle School ("Richardson"). On September 28, 2005, E.M. reported
8 doing stretching exercises with her classmates when a peer teased her. Id. at 1715.
9 E.M. became upset, approached the student, and punched him in the mouth. Id. The
10 school suspended E.M; she had been at Richardson for fifteen days. On September
11 30, 2005, the suspension was extended pending the results of expulsion charges and
12 proceedings that had been brought against her.

13 On January 17, 2006, the District expelled E.M. The District apparently
14 offered to place E.M. in the Torrance Community Day School, where it sends students
15 who have been expelled from the District's schools.

16 **D. IEP MEETING**

17 In October 6, 2005, E.M.'s parents requested, in writing, that the District assess
18 E.M.'s eligibility for special education. Amy Schumaker, M.A. ("Ms. Schumaker"),
19 the school psychologist, performed an assessment and generated a report. The
20 assessment consisted of interviews with Ms. Magee, E.M., all of E.M.'s teachers at
21 Richardson, three of E.M.'s teachers at Walteria, the principals of Walteria and
22 Richardson, the California Department of Children and Family Services, and Rebecca
23 Akyuz, M.F.R., Psy.D. ("Dr. Akyuz") and Alan Green, M.D. ("Dr. Green"). Ms.
24 Schumaker also administered various psychological tests. On October 27, 2005, the
25 District conducted an IEP meeting. The IEP team determined that E.M. did not
26 qualify for special education under the ED category. In November 2005, dissatisfied
27 with the District's assessment, E.M.'s mother placed E.M. in the Center for Learning
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1 Unlimited (“the Center”), a certified California non-public school. At the time of the
2 administrative hearing, E.M. was still attending the Center.

3 **E. E.M.’S THERAPISTS**

4 In 2001, E.M. began seeing Dr. Akyuz, a licensed clinical psychologist, to
5 address issues related to E.M.’s unhappiness, anger, and social skills. Dr. Akyuz
6 diagnosed E.M. with dysthymic disorder, which she characterizes as a chronically
7 depressed or irritable mood that occurs for most of the day more days than not, and
8 for at least a year. Sometime in late 2005, Dr. Akyuz diagnosed E.M. with major
9 depression. In a report to the District, Dr. Akyuz indicated that the depression was a
10 “short term” condition. Id. at 1699. Specifically, Dr. Akyuz opined that E.M.’s
11 difficulties with peers were due to recent “situational stressors.” Id.

12 In or around September 2004, Dr. Akyuz referred E.M. to Dr. David Fox, Ph.D.
13 (“Dr. Fox”), a clinical psychologist. Dr. Fox opined that there “are no meaningful
14 patterns which might suggest a strong ‘brain-based’ origin to [E.M.’s] mood, temper
15 and impulsivity.” Id. at 1700. Dr. Fox also ruled out attention deficit and clinical and
16 latent mood disorders. However, Dr. Fox did not diagnose E.M. as suffering from any
17 disorder. Dr. Fox opined that E.M. becomes frustrated when she has difficulty
18 accomplishing a goal. According to Dr. Fox, E.M. was developing a dislike of
19 herself, and was dealing with personal identity issues.

20 In or around July 2005, Dr. Green, a psychiatrist, began treating E.M. Dr.
21 Green diagnosed E.M. with dysthymic disorder. In a letter dated September 26,
22 2005, to Mario Liberati, Richardson’s principal, Dr. Green stated that he had “begun
23 antidepressant treatment [for E.M.] for longstanding depression.”⁴ Id. at 1789.

27 ⁴ However, in report to the District dated October 26, 2005, Dr. Green states that
28 E.M.’s specific diagnosis is dysthymic disorder of a moderate condition.

1 IV. ADMINISTRATIVE PROCEEDINGS

2 On November 2005, E.M. initiated an administrative due process hearing
3 before the OAH. She alleged that the District failed to provide her with a FAPE for
4 the 2003-2004, 2004-2005, and 2005-2006 school years, in violation of the IDEA.

5 The specific issues before the ALJ were as follows:

- 6 1. Did the District deny Student a free appropriate public education (FAPE)
7 during the 2003-2004 school year and extended school year by failing to
8 fulfill its child find obligations?
- 9 2. Did the District deny Student a FAPE during the 2004-2005 school year
10 and extended school year by failing to fulfill its child find obligations?
- 11 3. Did the District deny Student a FAPE during the 2005-2006 school year
12 and extended school year by failing to find Student eligible for special
13 education and related services under the category of serious emotional
14 disturbance (ED), pursuant to California Code of Regulations, title 5,
15 section 3030, subdivisions (i) (2), (3), and/or (4)?
- 16 4. Did the District improperly fail to provide Student an independent
17 educational evaluation (IEE) during the 2005-2006 school year?
- 18 5. Is Student entitled to any or all of the following:
19 A. Compensatory education;
20 B. Placement at a non-public school designed to address her unique
21 needs, including counseling, social skills development classes,
22 anger management training, and an appropriate behavior
23 intervention plan;
24 C. Reimbursement for all expenses her parents incurred in obtaining
25 an independent assessment?

26 Id. at 0002.

27 On January 5, 2007, the ALJ rendered her decision. The ALJ found in the
28 District's favor on issues one and two, and in the Student's favor on issues three, four,

1 and five. Specifically, the ALJ found that the District met its child find obligations
2 for the 2003-2004 and 2004-2005 school years, and therefore that the District did not
3 deny E.M. a FAPE during the 2003-2004 and 2004-2005 school years. In this regard,
4 the ALJ found, inter alia, that during this period of time E.M.'s academic performance
5 remained at a high level, and that because E.M.'s behaviors coincided temporally with
6 stressful events in E.M.'s life, the District could have reasonably assumed that her
7 misconduct was transitory and/or reactionary to those life events. However, the ALJ
8 found that the District denied E.M. a FAPE for the 2005-2006 school year. According
9 to the ALJ, by this time E.M. had manifested behavioral problems in a variety of
10 settings, over a period of years, and the District's attempts at modifying those
11 behaviors were all unsuccessful. Accordingly, the ALJ ordered:

- 12 1. The District shall classify Student as eligible for
13 special education and related services as a Student
14 with ED. The District shall perform a functional
15 behavioral assessment, and then convene and hold an
16 IEP team meeting, at which time the IEP team shall
17 decide upon appropriate services for Student designed
18 to address her unique needs, including, but not limited
19 to, counseling, social skills training with an emphasis
20 on anger management and conflict resolution, and a
21 behavioral assessment. The IEP shall also decide
22 whether an AB 3632 referral is appropriate, and shall
23 decide upon an appropriate placement for Student, in
24 the least restrictive environment, for the 2007-2008
25 school year.
- 26 2. Student shall remain at the Center for the entire 2006-
27 2007 school year at District expense. Such expense
28 shall also include the expense incurred as a result of

1 Student's attendance at the Center since the beginning
2 of the 2006-2007 school year.

3 3. Student shall be reimbursed for the cost of attending the
4 Center, in the amount of \$21,020 through July 18, 2006.

5 4. Student shall be reimbursed for the independent assessment
6 performed by Dr. [Sandra] Kaler [R.N., Ph.d. "(Dr. Kaler)"],
7 in the amount of \$1600.

8 Id. at 0031.

9 **V. STANDARD OF REVIEW**

10 The standard of review applicable to IDEA administrative proceedings is
11 established by the statute itself. The IDEA provides that in evaluating an
12 administrative decision, the court "(i) shall receive the records of the administrative
13 proceedings; (ii) shall hear additional evidence at the request of a party; and (iii)
14 basing its decision on the preponderance of the evidence, shall grant such relief as the
15 court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C); see Ojai Unified Sch.
16 Dist. v. Jackson, 4 F.3d 1467, 1471-72 (9th Cir. 1993).

17 The Court reviews de novo the appropriateness of a special education
18 placement under the IDEA. Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1499 (9th
19 Cir. 1996); Livingston Sch. Dist. Nos. 4 & 1 v. Keenan, 82 F.3d 912, 915 (9th Cir.
20 1996). Despite the de novo standard of review, however, the court is required to give
21 due weight to the hearing officer's administrative findings and appropriate deference
22 to the policy decisions of school administrators. The Ninth Circuit has articulated the
23 deference to be given to the administrative findings as follows:

24 The court reviews de novo the appropriateness of a special education
25 placement under the IDEA. Nevertheless, when reviewing state
26 administrative decisions, courts must give due weight to judgments of
27 education policy[.] Therefore, the IDEA does not empower courts to
28 substitute their own notions of sound educational policy for those of the

1 school authorities which they review. Rather, the [c]ourt in recognition
 2 of the expertise of the administrative agency, must consider the findings
 3 carefully and endeavor to respond to the hearing officer's resolution of
 4 each material issue. After such consideration, the court is free to accept
 5 or reject the findings in part or in whole. Despite their discretion to
 6 reject the administrative findings after carefully considering them,
 7 however, courts are not permitted simply to ignore the administrative
 8 findings. At bottom, the court itself is free to determine independently
 9 how much weight to give the administrative findings in light of the
 10 enumerated factors. [internal citations and quotation marks omitted]

11 County of S.D. v. California Special Educ. Hearing Office, 93 F.3d 1458, 1466 (9th
 12 Cir. 1996); see also Board of Educ. of the Hendrick Hudson Cent. Sch. Dist.,
 13 Westchester County v. Rowley, 458 U.S. 176, 206 (1982). A court may, in its
 14 discretion, choose to accord greater deference to a hearing officer's findings when those
 15 findings are "thorough and careful." Capistrano Unified Sch. Dist. v. Wartenberg, 59
 16 F.3d 884, 891 (9th Cir. 1995). A court may "treat a hearing officer's findings as
 17 'thorough and careful' when the officer participates in the questioning of witnesses
 18 and writes a decision 'contain[ing] a complete factual background as well as a discrete
 19 analysis supporting the ultimate conclusions.'" R.B. v. Napa Valley Unified Sch.
 20 Dist., 496 F.3d 932, 942 (9th Cir. 2007) (quoting Park v. Anaheim Union High Sch.
 21 Dist., 464 F.3d 1025, 1031 (9th Cir. 2006)).⁵

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 23 ⁵ In Park, the Ninth Circuit
 24 accor[ed] the Hearing Officer's determinations due weight
 25 because they were thorough and careful: the hearing lasted over
 26 eight days, the Hearing Officer was engaged in the hearing and
 27 questioned the witnesses to ensure the record contained
 28 complete information and that he understood the testimony. The
 decision entered by the Hearing Officer contains a complete
 factual background as well as a discrete analysis supporting the

(continued...)

Here, the administrative hearing lasted four days. The ALJ's thirty-two page decision contains a detailed factual background and a thorough analysis of the legal issues presented. Indeed, the District does not argue that ALJ's decision is not entitled to particular deference.⁶ Therefore, the Court will give the ALJ's decision deference.

VI. DISCUSSION

A. WHETHER THE DISTRICT VIOLATED ITS CHILD FIND OBLIGATIONS DURING THE 2003-2004 AND 2004-2005 SCHOOL YEARS

A school district breaches its child find duty if it had reason to, but did not, suspect a child as having a disability and needing special education services, and therefore did not assess the child for such services. See Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001) ("[T]he child-find duty is triggered when the [state or local administrative agency] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.") (internal quotations omitted). The school "'shall be deemed to have knowledge that a child is a child with a disability if [among other things] . . . the behavior or performance of the child demonstrates the need for such services.'" Id. (quoting 20 U.S.C. § 1415(k)(8)(3)(ii)) (alterations in original).

⁵(...continued)

ultimate conclusions.

Park, 464 F.3d at 1031; see also Mendoza v. Placentia Yorba Linda Unified Sch. Dist., 2008 U.S. App. LEXIS 10606, at *2 (9th Cir. May 14, 2008) (according the ALJ's decision deference where the "record reveal[ed] that the ALJ was an active participant during the five-day hearing, and her decision contain[ed] a lengthy discussion of the facts and a detailed analysis of the law.").

⁶ Although Student acknowledges that a hearing officer's decision is entitled to deference when it is thorough and careful, Student does not affirmatively address whether the decision here is entitled to deference.

1 Here, the ALJ found that the District did not violate its child find obligation
2 during the 2003-2004 and 2004-2005 school years. The Court concludes that the
3 record supports the ALJ's finding. During the first trimester of the 2003-2004 school
4 year, E.M. was placed in the GATE Program. Although E.M. had exhibited
5 inappropriate behaviors, at the time, the District could have reasonably concluded that
6 they were transitory, and/or brought upon by changes in E.M.'s life. For example,
7 E.M. began attending a new school after the first trimester of the 2003-2004 school
8 year. Further, at the time, E.M.'s parents downplayed E.M.'s problems. On May 6,
9 2003, when E.M. was in the third grade at Edison, Edison convened a Student Success
10 Team ("SST") meeting to address E.M.'s behavioral problems. According to the SST
11 Consultation Form, E.M.'s parents told the members of the SST that E.M. was
12 "dramatic," "lives a sit-com life," and that the behavior charts that were being utilized
13 were "effective." A.R. at 1703. In a letter to E.M.'s third grade teacher, Ms. Magee
14 states that although E.M. has had problems with controlling her anger, she had "made
15 great progress." *Id.* at 1992. Ms. Magee does not suggest that E.M. was unhappy or
16 that was having any problems developing relationships with her peers. Although it
17 appears that the District knew that E.M. was seeing a therapist in 2003, it does not
18 appear that anyone informed the District that Dr. Akyuz had diagnosed E.M. with
19 dysthymic disorder, a chronic, low-grade condition characterized by depressive
20 symptoms, until September 2005. Nor does it appear that the District had knowledge
21 of E.M.'s problems at camp at this time. Finally, during the 2003-2004 school year,
22 neither E.M.'s parents nor Dr. Akyuz requested a special education assessment for
23 E.M. For these reasons, the Court is unpersuaded by Student's arguments, and
24 therefore finds that the District did not violate its child find obligation during the
25 2003-2004 school year.

26 Nor did the District violate its child find obligation during the 2004-2005
27 school year. At the beginning of the 2004-2005 school year, on September 22, 2004,
28 Ms. Magee completed a health history form. She checked a box indicating the E.M.

1 did not have any emotional or mental conditions that required regular medical
2 observation. Although she stated that “testing [was] in progress,” she indicated that
3 there was no diagnosis at that time. *Id.* at 1883. In or around October 2004, Dr. Fox,
4 a clinical psychologist evaluated E.M., and issued a report. Ms. Magee shared Dr.
5 Fox’s report with Ms. Ryan and E.M.’s home room teacher. However, that report
6 does not indicate that E.M. was in need of special education, nor does it urge the
7 District to assess E.M. for special education. In early 2005, E.M. parent’s separated,
8 and in February 2005 E.M. was removed from her home and placed in foster care.
9 The Court is unpersuaded that, at the time, it was unreasonable for the District to
10 conclude that E.M.’s bad behaviors were due to situational stressors. Finally, Ms.
11 Magee did not make a written request for an assessment. Ms. Magee claims that she
12 orally requested an assessment during a conversation with Ms. Ryan. However, the
13 Court agrees with the ALJ that it is not clear that Ms. Magee’s alleged conversation
14 with Ms. Ryan constituted such a request. Based on the record, and the ALJ’s
15 thorough analysis, the Court is unpersuaded that the District should have suspected
16 that E.M. was a child with a disability during the 2004-2005 school years.

17 The Court therefore affirms the ALJ’s decision in this regard.

18 **B. WHETHER E.M. QUALIFIED AS A CHILD WITH DISABILITY**
19 **BECAUSE SHE HAD A SERIOUS EMOTIONAL DISTURBANCE**
20 **DURING THE 2005-2006 SCHOOL YEAR**

21 Next, the Court turns to whether E.M. qualified for special education and
22 related services as a child with a disability under the ED category. The Court
23 considers only those IDEA criteria that are addressed by the parties, namely whether
24 E.M. was eligible for IDEA benefits because she could not maintain interpersonal
25 relationships, behaved inappropriately under normal circumstances, or was
26 pervasively unhappy.

27 **1. Inability to maintain interpersonal relationships**
28

1 The ALJ found that E.M. developed satisfactory relationships with her teachers.
 2 Although arguably there was conflicting evidence regarding E.M.'s relationships with
 3 her peers, E.M. had satisfactory relationships with her teachers. For example, there is
 4 evidence that E.M. gave her teachers gifts, notes, and pictures that she had drawn.
 5 E.M.'s teacher during fourth and fifth grade, Maria Guarderas-Ruth ("Ms. Guarderas-
 6 Ruth"), testified that she and E.M. would "joke around," and that they would talk
 7 about books, and about E.M.'s heritage. A.R. at 0816:8-15. Ms. Guarderas-Ruth
 8 stated that during fifth grade she developed a closer relationship with E.M. such that
 9 E.M. confided in Ms. Guarderas-Ruth. Id. at 0817:21-0818:3; 0829:21 ("I was very
 10 close to [E.M.]"). Gail Novak ("Ms. Novak"), E.M.'s teacher during sixth grade, also
 11 testified that she was able to develop a relationship with E.M. Id. at 0393:16-18.
 12 E.M. spoke to Ms. Novak about her interests in music, and even brought Ms. Novak a
 13 CD to listen to. Id. at 0393:19-0394:17. Although Dr. Kaler opined that E.M.'s gift-
 14 giving was inappropriate describing it as "an attempt to buy a friend," the ALJ
 15 reasonably discounted that testimony because Dr. Kaler never observed E.M. interact
 16 with her teachers, nor did Dr. Kaler interview E.M.'s teachers. Id. at 0444:15-19.⁷

17 The statute is clear that to qualify as a child with a disability under this prong,
 18 the child must exhibit "[a]n inability to build or maintain satisfactory interpersonal
 19 relationships with peers *and* teachers." 34 C.F.R. § 300.8(c)(4)(i)(B) (emphasis
 20 added); Cal. Code Regs. tit. 5 § 3030(i)(2); R.B. v. Napa Valley Unified Sch. Dist.,
 21 496 F.3d 932, 944 (9th Cir. 2007); In re Fresno Unified Sch. Dist., 39 IDELR 28 (Cal.
 22 SEA 2003) (stating that this prong sets a "high standard," and finding that the student
 23 did not meet the requirements because the student had a satisfactory relationship with

24
 25 ⁷ After the District's IEP meeting, E.M. and her parents informed the District that
 26 they disagreed with the District's psychological assessment, and requested an independent
 27 evaluation. See 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.503(b); Seattle Sch. Dist., No.
 28 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996). The District did not respond to the request.
 Therefore, E.M.'s parents obtained an independent evaluation from Dr. Kaler, a licensed
 psychologist.

one teacher, and had built several relationships with peers during the school year). In this case, there is evidence that at the very least, E.M. was able to develop satisfactory relationships with her teachers. Therefore, even assuming arguendo that E.M. was not able to maintain relationships with her peers, as argued by Student, E.M. was not eligible for special education under this prong.

2. Inappropriate types of behavior or feelings

The District contends that E.M. does not qualify as a child with a disability under this prong because E.M.'s behaviors are neither psychotic nor bizarre, and because E.M.'s behaviors are more consistent with social maladjustment, than with ED. First, the District argues that because E.M. is a child with superior intelligence, she expects to excel at tasks, and when she does not, she acts out. Second, the District argues that E.M. acts out when she is not able to control a situation. Third, the District argues that E.M.'s behaviors are inappropriate responses to social stressors. Fourth, the District argues that E.M.'s behaviors were purposeful, and that she was able to control her behaviors when she wanted to do so.

Inappropriate types of behavior or feelings under normal circumstances is meant to describe unusual or bizarre behavior by a student under normal conditions. Running away from a stressful situation, whether at home or at school, is not characteristic of type of behavior this definition contemplates. Nor is the taking of alcohol or drugs, however harmful, such an inappropriate act under normal conditions as to come within this definition.

In re: Sacramento County Office of Educ., 3 EHLR 503:314 (Cal. SEA 1982); Manhattan Beach Unified Sch. Dist., Case No. 1313 (Cal. SEA March 14, 2001) (stating that inappropriate types of behaviors under normal circumstances does not require the student to "manifest bizarre, hallucinatory, psychotic, or delusional behavior"); Fresno Unified Sch. Dist., Case No. 2700 (Cal. SEA Jan. 16, 2003) ("The District's assertion that STUDENT's behavior must either bizarre (or withdrawn) to

1 meet the ED criteria also fails. First, neither federal nor State special education law
 2 imposes this requirement. Second, . . . STUDENT is in the fourth grade, and no one
 3 refuted testimony that STUDENT's serious interest in death and his expressed desire
 4 that someone kill him constitute aberrant behavior and feelings for a fourth-grade
 5 student."). A child may qualify for special education under this characteristic, if the
 6 child's behaviors are "potentially or actually harmful to the student or to others."
 7 A.R. at 1717.

8 For example, in R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir.
 9 2007), the Ninth Circuit noted that the inappropriateness of the student's behavior
 10 over the course of two school years, which included physical attacks and damage to
 11 property, was "manifest."⁸ In In re: Burton Valley School District, 3 ELHR 503:256
 12 (Cal. SEA 1982), the hearing officer found that the student exhibited inappropriate
 13 behaviors under normal circumstances where the record demonstrated that the student
 14 responded aggressively to his peers, was aggressive towards property, was not able to

15
 16 ⁸ There,

17 As a fifth grader, R.B. was sent to the principal's office for, e.g.,
 18 pinching and twisting classmates' arms on the playground on
 19 multiple occasions, tearing up classroom materials, verbalizing
 20 her hope that her music teacher would die, poking a classmate
 21 with a pencil because he would not help her cheat, and using the
 22 f-word . . . R.B. physically attacked counselors at Intermountain
 23 and damaged property at least daily. R.B. would also attack
 24 younger children and throw food. R.B. admitted that she
 25 deliberately included grammatical errors in her written work
 26 because she enjoyed making life difficult for [her teacher,]
 27 [Kathy] Brandt. When R.B. became a danger to herself or to
 28 others, Brandt would send R.B. to "day coverage": this
 happened weekly during R.B.'s first four months in the
 classroom.

R.B., 496 F.3d at 945. However, the Ninth Circuit questioned whether "R.B.'s
 inappropriate behavior took place under the requisite 'normal circumstances' because R.B.
 was not regularly taking her ADHD medication for most of the fifth grade year," and
 because "R.B. was adapting to life at a new school away from her family." Id.

1 control his behaviors, and had to be physically restrained once he began acting out.
 2 Id. at 503:256-57. On other hand, occasional fighting, rude, and/or disruptive
 3 behavior, without more, has been found to be insufficient. See e.g., Hollister Sch.
 4 District, 26 IDELR 632 (Cal. SEA 1997) (finding that student did not exhibit
 5 inappropriate behaviors under normal circumstances where student's behavior was
 6 described as "manageable," and none of the student's teachers described his behavior
 7 as bizarre).

8 "Both state and federal regulations make clear that a student is not to be
 9 classified as emotionally disturbed merely because of bad behavior that is not
 10 connected to an emotional disturbance - the regulations explicitly do not apply to
 11 students who are simply 'socially maladjusted.'" N.C. ex rel. M.C. v. Bedford Cent.
 12 Sch. Dist., 473 F. Supp. 2d 532, 544 (S.D.N.Y. 2007); see also Cal. Gov. Code §
 13 7576(b)(3) (stating that a student may be eligible for special education if his or her
 14 emotional or behavioral characteristics are "associated with a condition that cannot be
 15 described solely as a social maladjustment or a temporary adjustment problem, and
 16 cannot be resolved by short-term counseling.").⁹

17 Based on the foregoing, the Court is unpersuaded by the District's argument
 18 that E.M.'s behaviors cannot be considered inappropriate because her bad behaviors
 19 were a response to a person or a situation. Instead, the Court finds that the critical
 20 inquiry is whether E.M.'s reactions to everyday occurrences, such as teasing or
 21 frustration, were appropriate when considered in relation to how E.M.'s peers would

23 ⁹ Courts have found that a student is socially maladjusted, when the student acts in deliberate
 24 noncompliance with known social demands or expectations, see e.g., E.S. v. Fairfax County Sch. Bd., 134
 25 F.3d 659, 664 (4th Cir. 1998), or when the student's behavior is controlled, predictable, and purposeful,
 26 see e.g., Perris Union High Sch. Dist., Case No. 1396 (Cal. SEA 2000). Generally, drinking alcohol,
 27 abusing drugs, running away from home, or getting in the occasional fight are associated with social
 28 maladjustment, not ED. See In re Sequoia Union High Sch. Dist., 1987-88 ELHR Dec. 559:133, 135
 (N.D. Cal. 1987) ("[S]ocially maladjusted [is] a persistent pattern of violating societal norms with lots of
 truancy, substance . . . abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and
 manipulative."). A student who is socially maladjusted can still qualify for special education if the student
 is also emotionally disturbed.

1 react. See e.g., Hoffman v. East Troy Cmty. Sch. Dist., 38 F. Supp. 2d 750, 761, 767
2 (E.D. Wis. 1999) (stating that to be considered as suffering from an emotional
3 disturbance, the student's "behavioral problems must be unusually serious as
4 compared to the majority of his peers and must present a significant impediment to
5 learning."); Los Angeles Unified Sch. Dist., Case No. 985 (Cal. SEA March 11, 1999)
6 (finding that this ED criteria was not satisfied where there was "no evidence that the
7 one or two short bouts of crying at school for a few minutes were not within the
8 expected behavior of a seven-year at-old who has failed to get his way").

9 The Court agrees with the ALJ that E.M. qualifies as a child with ED under this
10 prong. The record is clear that E.M. reacted aggressively to everyday events. For
11 example, there is evidence that E.M. had been suspended and/or disciplined on
12 multiple occasions for punching, tripping, bullying, and otherwise physically harming
13 her classmates. Even at Richardson, where E.M. had been for only fifteen days before
14 her expulsion, students complained that E.M. kicked and hit her classmates if she was
15 upset. A.R. at 2082. Certainly, it is inappropriate to consistently respond to teasing
16 by inflicting physical harm on one's peers.¹⁰ Although the District could have initially
17 concluded that E.M.'s behavioral problems were due to turmoil in her life, the fact
18 that they persisted throughout her time at the District's schools, and in a variety of
19 settings, shows that E.M.'s problems were not situational. As the ALJ noted, the
20 September 28, 2005 incident, which resulted in E.M.'s expulsion from school,
21 occurred after E.M. had been placed back in the custody of her mother. During her
22 testimony, Ms. Schumaker could not associate all of E.M.'s bad behaviors with a
23 stressful life event. See e.g., A.R. at 0335:9-0367:4. Further, the Court is
24 unpersuaded that E.M.'s conduct was caused by social maladjustment. E.M. has had
25 problems with aggression as far back as kindergarten. Over the years, E.M. has seen

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27 ¹⁰ For this reason, the Court finds Ms. Schumaker's testimony that E.M. did not
28 display inappropriate behaviors for purposes of the IDEA because her aggression was
"situation specific," to be unavailing. See e.g., A.R. at 0144:21-23.

1 multiple therapists to help control her outbursts and aggression problems. The
2 District has also attempted various interventions to teach E.M. control. For example,
3 E.M. participated in the friendship club (a club within the District targeted at students
4 who had difficulty resolving conflicts with peers), she was preferentially seated, she
5 was on a behavior contract, her parents were often consulted, and she was also
6 allowed to take breaks in the principal's office when she felt stressed. However, the
7 record shows that none of these interventions rectified the situation: E.M.'s responses
8 continued to be out of proportion to the events with which she was confronted.
9 Additionally, E.M.'s private therapists all testified that E.M. was suffering from
10 identity issues. In light of the intensity of E.M.'s inappropriate behaviors, and the
11 showing that despite the various long-term interventions, her aggression did not
12 diminish, the Court finds that E.M.'s behavioral problems were not the result of social
13 maladjustment alone.

14 Having found that E.M. displayed inappropriate behaviors under normal
15 circumstances, the Court next turns to the question of whether E.M. exhibited those
16 behaviors for long period of time and to a marked degree, and whether those
17 behaviors adversely affected E.M.'s educational performance. E.M. exhibited her
18 inappropriate behaviors in several situations, e.g., at home, at school, and at camp.
19 These inappropriate behaviors were demonstrated in "an overt, acute, and observable
20 manner." See In re S.D. Unified Sch. Dist., Case No. 040313 (Cal. SEA Aug. 30,
21 2006) (citing California State Department of Education, Identification and Assessment
22 of the Seriously Emotionally Disturbed Child: A Manual for Educational and Mental
23 Health Professionals, p. 8 (1986)). The behaviors produced distress both to E.M. and
24 to her classmates. Therefore, E.M.'s behaviors occurred to a marked degree. Finally,
25 the record shows that E.M.'s violent outbursts occurred throughout her time at the
26 District's schools. In the last two years at the District's schools, E.M. repeatedly
27 engaged in the inappropriate behaviors. Moreover, as stated supra, various efforts at
28 behavioral intervention and modification did not correct the behavior.

1 Although Ms. Schumaker opined otherwise, she administered behavioral
2 checklists only to E.M.'s teachers at Richardson, where E.M. had been for only fifteen
3 days. Ms. Schumaker did not observe E.M. at a school in the District since at the time
4 of the assessment, E.M. had already been expelled. See e.g., A.R. at 0147:18-24.
5 Therefore, the Court finds, as the did the ALJ, that the District "did not place [E.M.'s]
6 behavior into the broad historical context that it warranted." Id. at 0023.¹¹ The youth
7 self report completed by E.M. showed clinically significant scores in the social
8 problems and aggressive behaviors categories. Further, Ms. Schumaker did not
9 observe E.M. at a District school. Ms. Schumaker testified that E.M. did not qualify
10 as a child with ED under this prong because the aggressive episodes were "isolated
11 incidences," and E.M. went "three years without any kind of . . . suspensions or
12 aggressive acts that resulted in suspensions." Id. at 0312:9-12, 0319:21-22, 0320:1-2.
13 Ms. Schumaker appears to be referring to the absence of suspensions between 2000
14 and 2003. Although E.M. was not suspended during those times, her progress reports
15 during those years demonstrated that E.M. had problems with anger management.
16 Her teachers at Edison utilized informal behavioral intervention strategies to teach
17 E.M. how to control her anger. On May 6, 2003, a SST was convened. Id. at 1703.
18 The SST Consultation Form indicates that the main areas of concern as "behavior –
19 [E.M.] becomes upset and acts inappropriate[.] [E.M.] threw chair at teacher; [E.M.]
20 banged head with objects – water bottle, clip board." Id. By the time of the IEP
21 meeting in October 2005, E.M. had consistently engaged in bad behaviors since the
22 2003-2004 school year. The Court finds that the record amply supports the ALJ's
23 conclusion that E.M.'s inappropriate behaviors were to a marked degree and for a
24 long period of time.

25
26
27 ¹¹ The responses of three of the teachers indicated borderline clinically significant
28 elevation in the social problems category, and on teacher's response indicated a borderline
clinically significant elevation in the aggression category.

1 The District's opening brief does not challenge the ALJ's finding that E.M.'s
2 education had been adversely affected. Nor does the District address this criterion in
3 its opposition to E.M.'s August 21, 2008. The Court therefore concludes that the
4 District has conceded this issue, and that this criterion is satisfied. Even if the District
5 could be deemed to challenge this finding, the Court finds that the ALJ appropriately
6 concluded that E.M.'s inappropriate behaviors adversely affected her educational
7 performance. Specifically, the District expelled E.M. after she punched a student
8 several times in the stomach on the grounds that E.M. had a history of previous fights,
9 different types of interventions had been attempted, but failed, and that E.M. posed a
10 danger to the safety of other students because she uses physical violence when she
11 gets angry. Id. at 1860. The Court finds that the inability to attend school altogether
12 deprives a student "the IDEA's guarantees to '[a] basic floor of opportunity.'" R.B. v.
13 Napa Valley Unified Sch. Dist., 496 F.3d 932, 946 (9th Cir. 2007) (quoting Bd. of
14 Educ. v. Rowley, 458 U.S. 176, 201 (1982)).

15 The Court recognizes that it is not clear that mere absence from school or
16 "educational disruption alone" satisfies the adverse affect on educational performance
17 criterion. See e.g., Sequoia Union High Sch., Case No. 1092 (Cal. SEA March 18,
18 1996); Ventura Unified Sch. Dist., et al., Case No. 1943 (Cal. SEA Nov. 1, 2001).
19 However, in this case, E.M. was not merely absent from school, but instead, she was
20 prevented from attending at all. Although it appears that the District offered to place
21 E.M. in Torrance Community Day School, this is a public school in the District
22 populated by students whom the District has expelled. Further, although the Court
23 does not rely on this evidence to reach its conclusion herein, the Court notes that E.M.
24 continued to have behavioral problems at the Center, and had to be placed on home
25 tutoring.

26 Based on the foregoing, the Court finds that E.M. qualified as a child with a
27 disability for purposes of the IDEA because she manifested inappropriate behaviors
28 under normal circumstances, to a marked degree, for a long period of time, and those

1 behaviors adversely affected her educational performance. E.M. was therefore
 2 eligible for special education under the IDEA, and was entitled to a FAPE, which the
 3 District denied.

4 **3. A general pervasive mood of unhappiness or depression**

5 “A diagnosis of dysthymia from the Diagnostic and Statistical Manual of
 6 Mental Disorders” does not automatically prove that a student has a general pervasive
 7 mood of unhappiness or depression. Pleasant Valley Sch. Dist., Case No. 909 (Cal.
 8 SEA Oct. 9, 1997). However it is relevant evidence to be considered. Id.; see also
 9 Sierra Sands Unified Sch. Dist., 30 IDELR 306 (Cal. SEA 1998). To satisfy this
 10 prong, the mood of unhappiness or depression must be “evidenced in all areas of life,
 11 including school and home.” Sierra Sands Unified Sch. Dist., 30 IDELR 306 (Cal.
 12 SEA 1998); Hollister Sch. District, Case No. 385 (Cal. SEA June 6, 1997) (“M]ood or
 13 unhappiness must be exhibited in major areas of STUDENT’s life, including school,
 14 community, and home.”).

15 E.M.’s therapists and proffered experts offered differing views of E.M.’s
 16 diagnosis. Dr. Akyuz diagnosed E.M. dysthymic disorder, and for a short period of
 17 time, with major depression. A.R. at 0236:5-9. However, her report to the District
 18 dated October 18, 2005, which diagnoses E.M. with major depression, states that the
 19 depression was due to “current [and] recent past situational stressors,” and that it was
 20 “short term.” Id. at 1699. Dr. Green diagnosed E.M. with dysthymic disorder. Id. at
 21 1765. Dr. Green prescribed Zoloft for the depression.¹² However, in a letter to
 22 Richardson’s principal, Mario Liberati, Dr. Green states that he recently began
 23 “antidepressant treatment for long term depression,” and that E.M. was responding to
 24 the medication. Id. at 1789. In a report completed after the District IEP Assessment,
 25 on May 23, 2006, Dr. Kaler opined that E.M. “met the criteria for Dysthymia, Major

26
 27 ¹² E.M. was also prescribed Seroquel to control E.M.’s mood volatility and
 28 aggression, however, as pointed out by the ALJ, it does not appear that the District was
 aware of this.

1 Depressive Disorder, and Identity Disorder, a juvenile precursor to Borderline
2 Personality Disorder.” *Id.* at 1404. However, Dr. Kaler had only spent four hours
3 with E.M., and had never her observed in any school setting or with a peer. Further,
4 Dr. Kaler conceded during the administrative hearing that E.M.’s depression could be
5 transitory, and agreed that the “record does seem to show there were periods in
6 between her clear depression that seemed to be affectively fairly neutral.” *Id.* at
7 0425:20-23. Dr. Fox’s report does not diagnose E.M. with any depressive disorder,
8 nor does it state that E.M. needs special education. *Id.* at 1701. Nor did Ms.
9 Schumaker’s assessment show E.M. to be depressed. Further, E.M.’s teachers only
10 observed a mood of unhappiness during the end of fifth grade, and occasionally in
11 sixth grade. The Court agrees with the ALJ, that this evidence was inconclusive, and
12 does not show that E.M.’s unhappiness was generally pervasive, that it was observed
13 in a several environments, that it was to a marked degree, that it occurred for a long
14 period of time, or that it adversely impacted E.M.’s educational performance.

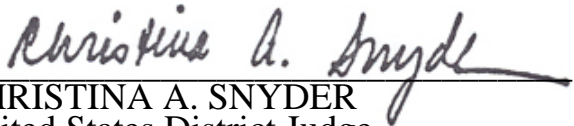
15 **VII. CONCLUSION**

16 The Court finds that the District did not violate is child find duty during the
17 2003-2004 and 2004-2005 school years. However, by the time of the District’s IEP
18 meeting on October 27, 2006, the Court finds that E.M. qualified as a child with a
19 disability under the IDEA. In deciding that she did not, the District denied E.M. a
20 FAPE to which she was entitled. Because the Court finds that the District failed to
21 provide E.M. a FAPE during the 2005-2006 school year, and because the District does
22 not argue that Ms. Magee’s choice of private placement, the Center, was
23 inappropriate, the Court finds that the ALJ appropriately ordered the District to
24 reimburse Student for the cost of attending the Center. Therefore, in accordance with
25 the foregoing, the Court AFFIRMS the ALJ’s decision issued on January 5, 2007.
26 The Court DENIES E.M.’s motion for summary judgment as it pertains to the
27 District’s child find duties during the 2003-2004 and 2004-2005 school years, and
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1 GRANTS E.M.'s motion for summary judgment as it pertains to E.M.'s entitled to
2 special education during the 2005-2006 school year.

3 IT IS SO ORDERED.

4 Dated: August 21, 2008

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6 
7 CHRISTINA A. SNYDER
8 United States District Judge
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